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In The

# Supreme Court of the United States

WILFREDO SCHERY,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

**Question One:** Does Federal Rule of Criminal Procedure 36, when properly construed, grant jurisdiction to a trial court to alter a written judgment eight years after it was filed, in order to accurately reflect the trial judge's oral pronouncement during the initial sentencing proceeding that the defendant was to receive credit on this federal sentence for time served on a state criminal sentence that was imposed prior to this federal sentencing proceeding and that was then done pursuant to United States Sentencing Guideline 5G1.3(b)?

**Question Two:** Do the opinions in *Ins. Co. v. Boon*, 95 U.S. 117 (1877) and *In re Wright*, 134 U.S. 136 (1890) accurately state the legal standard to be used to determine the applicability and inapplicability of the Federal Rule of Criminal Procedure 36, which was promulgated years after those opinions were filed?

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## PETITION FOR A WRIT OF CERTIORARI

The petitioner, WILFREDO SCHERY, petitions this Court to review the final judgment and opinion of the United States Court of Appeals for the Eleventh Circuit issued in this case.

## OPINION BELOW

The federal appellate court decision to be reviewed is unpublished. A copy of that typewritten document is reproduced in the appendix to this petition at App. 1.

## BASIS FOR JURISDICTION

The decision of the lower federal appellate court was filed on April 16, 2009. (App. 1). That lower appellate court denied rehearing in an order filed May 21, 2009. (App. 12). This Court has jurisdiction to review this petition pursuant to Title 18 United States Code section 1254.

## FEDERAL RULE INVOLVED

FEDERAL RULE OF CRIMINAL PROCEDURE 36

Rule 36. **Clerical Error**

After giving any notice it considers appropriate, the court may at any time correct a

clerical error in a judgment, order or other part of the record, or correct an error in the record arising from oversight or omission.

## STATEMENT OF THE CASE

Petitioner Schery was initially charged in this federal criminal case on April 2, 1997 in a third superceding indictment that contained a total of thirty-eight counts. In this third superceding indictment, the primary criminal perpetrator was Luis Cano, although there was a total of nine defendants including newly charged petitioner Schery. Petitioner Schery, himself, was charged in Count 2 with conspiracy to possess with intent to distribute cocaine. The span of this conspiracy of which petitioner Schery was a codefendant lasted from February 1987 through October 1, 1996. Petitioner Schery was also charged with possession of cocaine in 1994 (Count 9), and monetary crimes (money laundering) related to that drug activity (Counts 14 through 25).

At the time that petitioner Schery was indicted in this federal case, Mr. Schery was already in state custody, incarcerated in a State of New York prison, Sing Sing Correctional Facility located in Ossining, New York. As a consequence, the federal trial court issued a writ of habeas corpus ad prosequendum for the purpose of having the federal government take physical custody of Mr. Schery and bring him to Miami, Florida for trial on this federal indictment.

Petitioner Schery was arrested on this indictment on August 26, 1997[1] and arraigned in Miami, Florida on September 19, 1997.

On December 21, 1998, defendant Schery entered a plea of guilty to Count 2 of the fourth superceding indictment, i.e., to the crime of a drug conspiracy running from February 1987 through October 1, 1996. This guilty plea was the product of a plea agreement. In pertinent part, that written plea agreement provided the following: All charges other than Count 2 would be dismissed at sentencing. The sentence would be imposed pursuant to the federal sentencing guidelines and the applicable guidelines would be determined by the trial judge. The trial judge could depart from the guidelines range and impose a sentence that was either more severe or less severe than the guideline range. The trial judge must impose a minimum mandatory sentence of ten years. The Government agreed that the defendant was entitled to a three-level reduction due to his guilty plea and agreed "to recommend that the defendant be sentenced to the low end of the guideline range determined by the Court." Most important, paragraph 8 of that plea agreement stated: "The United States

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[1] A fourth superceding indictment was filed in Miami, Florida on the next day, August 27, 1997. This indictment added a tenth codefendant and increased the total counts to seventy-six. However, the charges against petitioner Schery remained the same as those with which petitioner Schery was first federally charged in the third superceding indictment.

agrees not to oppose the defendant's request that his sentence run **concurrent with his New York state sentence** in the case of State of New York v. Schery, Case No. 2896-94."[2]

Mr. Schery's presentence investigation report (i.e., PSI) revealed the following matters pertinent to this petition. Factually, defendant Schery was involved in the Cano criminal enterprise since October of 1989. Petitioner Schery was arrested in New York in 1994. To calculate the base offense level, the PSI held petitioner Schery accountable for more than 150 kilograms of cocaine, setting his base offense level at 38. The amount of cocaine taken into account for calculation of petitioner Schery's offense level included the amount of cocaine involved in his New York case and for which he was also charged federally with the crime of possession of cocaine. The PSI stated that the New York Drug Task Force seized 298 kilograms of cocaine and in excess of one million dollars in drug proceeds on April 5-6, 1994. Defendant Schery was given a final offense level of 35. When assessing his criminal history, the presentence investigation report stated that petitioner Schery had been arrested by the State of New York Drug

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[2] This case was filed in the Supreme Court of the State of New York in the County of New York. The style was People of the State of New York v. Wilfredo Schery and was given indictment number 2864/94. The "94" refers to the year 1994. The presentence investigation report identifies that New York prosecution as "Dkt. #94N024276."

Enforcement Task force on April 5, 1994 and sentenced to twenty (20) years to life on May 14, 1996. Based on this New York conviction and another conviction, defendant Schery was assigned three criminal history points, giving him a criminal history category of II. This report concluded that Mr. Schery was subject to a ten-year minimum mandatory sentence and a guideline range of 188 months to 235 months.

The factual relationship between defendant Schery's New York conviction and his involvement in the Cano criminal organization is not disputable. Indeed, those facts are contained in another opinion of the lower appellate court issued following the appeal of the jury trial conviction of the organizational leader, Mr. Cano. *United States v. Cano*, 289 F.3d 1354 (11th Cir. 2002) reflects that Cano's trial was before the same Judge Norman C. Roettger, Jr., before whom petitioner Schery pled guilty and was subsequently sentenced. *United States v. Cano*, 289 F.3d 1354 at 1357-1359 (11th Cir. 2002) establishes: New York City was the primary destination for Cano's drug shipments. Petitioner Schery supervised the network's operations in the New York area. The New York Police Department maintained an active wiretap on Schery's cellular telephone in the New York area. **"On April 5, 1994, the NYPD arrested Schery"**, *id.* at 1358, and seized 297 kilograms of cocaine. An additional kilogram was seized during a search of Schery's residence.

In petitioner Schery's only federal criminal prosecution, on September 11, 2000, petitioner Schery's federal criminal defense counsel filed a sentencing memorandum which included objections to the presentence investigation report. Obviously, defense counsel was using the United States Sentencing Guidelines in effect during September of 2000.[3] That memorandum, in its entirety, is contained at App. 14-22. For the purpose of brevity, only the most salient assertions are included here.

As previously stated, the Government agreed in the plea agreement that this federal sentence to be imposed on September 13, 2000 "run concurrent with his New York state sentence" that petitioner Schery was then serving at the time that this federal sentencing was taking place. United States Sentencing Guideline 5G1.3(b) is one of the guidelines that deals with concurrent sentences and specifically addresses a situation, such as petitioner Schery's, where the defendant to be sentenced in federal court is serving an undischarged term of imprisonment – here, the New York sentence imposed on Mr. Schery in 1996 that involved incarceration from his arrest date on April 5, 1994.

Schery's defense sentencing memorandum asserted that pursuant to Section **5G1.3(b)**, United States Sentencing Guidelines, the trial court should

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[3] The version in effect on this date of sentencing was the 1998 Federal Sentencing Guidelines.

impose a sentence that is "**concurrent** with a term of imprisonment imposed upon him in a related case." This memorandum asserted that the New York case discussed in the plea agreement was unquestionably "a related case" for the purpose of application of this guideline provision. Defense counsel argued that *Witte v. United States*, 515 U.S. 389 (1995) endorsed application of Guideline 5G1.3 for the purpose of insuring sentencing fairness to the defendant. *Witte* stated that total punishment should be the same as if the federal trial judge was sentencing for different offenses at the same time and as if those offenses had been prosecuted in a single proceeding. That particular guideline served to protect a criminal defendant "against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct." *Id.* at 404-405.

Subsection (**b**) of Guideline 5G1.3 provided that, if applicable, "the sentence for the instant offense **shall** be imposed to run concurrently to the undischarged term of imprisonment." The Commentary Application Notes to the 1998 Federal Sentencing Guidelines discuss an "adjusted concurrent sentence" for subsection (b) cases and state that the trial court "**should** adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons." A further discussion in that commentary

establishes that the concept of what will not be credited by the Bureau of Prisons is controlled by Title 18 United States Code section 3585(b). On the date that petitioner Schery was sentenced, Supreme Court precedent established that this commentary was authoritative and binding upon the sentencing judge. *Stinson v. United States*, 508 U.S. 36 (1993). Moreover, on the date that petitioner Schery was sentenced, Supreme Court precedent established that the Bureau of Prisons would not grant credit for time spent in a state prison prior to the time that the state released a criminal to the federal government to begin service of his federal sentence. Rather, the applicable federal statute, 18 U.S.C. § 3585(b) directed that the Federal Bureau of Prisons begin giving credit only "after the defendant begins his sentence" and "authorizes credit only for time that 'has not been credited against another sentence.'" *United States v. Wilson*, 503 U.S. 329 at 333-334 (1992).

Defendant Schery was sentenced by Judge Norman Roettger on September 13, 2000. The entire transcript of that sentencing hearing is contained in the appendix at App. 23-42 for this Court's detailed review. Defense counsel argued that Guideline 5G1.3 should be utilized to provide petitioner Schery with credit for the time Mr. Schery had already served on his New York sentence that was imposed, in essence, for the same criminal involvement that petitioner Schery was being sentenced in this federal prosecution. Defense counsel noted that this sentencing judge knew the pertinent facts relating the federal charge

to the New York conviction, because this judge had tried the ringleader, Mr. Cano. The trial judge was informed that Mr. Schery was presently serving in a New York prison an indeterminate sentence of twenty (20) years to life. After Judge Roettger evidenced his intention to impose a concurrent sentence, that judge determined that the guideline calculation range of 188 months to 235 months was correct. At that point, defense counsel argued in accordance with the defense sentencing memorandum that Mr. Schery receive "credit" for the time Mr. Schery "served" in this matter. Judge Roettger orally stated: "**[I]t is the expectation of this Court that he receive credit for the time served with the New York authorities, for the sentence he received up there in the New York operation of the Cano Mako conspiracy. And I will put something in the J and C** [i.e., judgment and commitment order] **to that effect** if you would like. . . ." (App. 32-33). Judge Roettger said, "served with the New York authorities." The word "served" is use of the **past tense**. Judge Roettger had not yet imposed his federal sentence. Thus, Judge Roettger was using the word "served" to mean the time spent in a New York prison **prior to** this date of sentencing of September 13, 2000. There is no other way to read this transcript. Soon thereafter, Judge Roettger orally pronounced petitioner Schery's federal sentence. Judge Roettger determined that a sentence total of 188 months was sufficient punishment for this federal crime and that this federal sentence should run concurrently with the New York sentence that

Mr. Schery was "presently serving in the New York State system for an offense that was part of the conspiracy in this case." App. 36-37. Judge Roettger restated a second time during this brief sentencing hearing: "**It is the expectation of the Court that he receive credit for time served under the New York judgment which he is presently serving because it involves part of the acts that were or that constituted part of the conspiracy and possession with intent to distribute and distribution in this case.**" (App. 39). Once again, Judge Roettger used the past tense verb "served," evidencing indisputably that Judge Roettger was giving – and intended to give – petitioner Schery credit on that 188 total months for the time Mr. Schery spent from Schery's April 4, 1994 arrest up to September 13, 2000 – the date of Schery's federal sentence in this federal prosecution.

When defendant Schery left the courtroom on September 13, 2000, nobody attending that proceeding could have any doubt that Judge Roettger was applying *Witte v. United States*, 515 U.S. 389 (1995) and United States Sentencing Guideline 5G1.3(b) to include the already-served time in the State of New York penal system from Mr. Schery's arrest up to September 13, 2000.

The total amount of months from April 4, 1994 until September 13, 2000 can be determined with absolute certainty. That time period encompasses seventy-seven (77) months.

On September 19, 2000, which was six days after the sentencing proceeding, Judge Roettger signed a written judgment. (App. 45). Although this written judgment limited Mr. Schery's federal sentence to "a total term of 188 months" and although this written judgment stated that this federal sentence was "to run concurrently with defendant's present sentence in [the] New York State system," there was no written indication anywhere on that particular written judgment that Mr. Schery was to be credited with the time Mr. Schery had already served in the New York penal system from April 4, 1994 until September 13, 2000 when his federal sentence was orally imposed.

Petitioner Schery never appealed this federal sentence. There was no legal error committed by Judge Roettger in sentencing Mr. Schery. That is especially true regarding the application of United States Sentencing Guideline 5G1.3(b) and its pertinent commentary. Likewise, the Government did not appeal that sentence.[4]

Following this September 13, 2000 federal sentencing proceeding and under the reasoning of *Ponzi v. Fessenden*, 258 U.S. 254 (1922), the federal

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[4] On September 28, 2000, the Government filed a motion pursuant to Federal Rule of Criminal Procedure 36 to correct this judgment on the basis that the trial court cannot order that the sentence be served in a federal facility. The trial judge granted that motion and issued an order amending the written judgment to read: "The court recommends that these sentences be served in the Federal system." (App. 48).

government had to turn custody of petitioner Schery back to the State of New York, which merely loaned Mr. Schery to the federal government for this federal prosecution, in order to permit the government that first had custody of Mr. Schery, i.e., the State of New York, to exact the full measure of the State of New York's prior criminal sentence of twenty (20) years to life. On September 13, 2000, no one knew how long Mr. Schery would be imprisoned in the State of New York penal system on his indeterminate sentence.

The sentencing trial judge, Judge Norman C. Roettger, died on July 26, 2003 in Ft. Lauderdale, Florida. Federal Judicial Center, Federal judicial history, Biography Directory of federal judges since 1789, **Roettger, Norman Charles Jr.** http://www.fjc.gov/public/home.nsf/hisj.

Mr. Schery had a minimum sentence of twenty years to serve in a New York prison. New York could have kept Mr. Schery in a New York facility for life. Based on circumstances that could not have been foreseen in September of 2000, Mr. Schery was released from custody of the State of New York and officially was placed into the custody of the United States Government on May 1, 2007.[5] Petitioner

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[5] That date is based on an affidavit from the Bureau of Prisons, which was submitted without objection as an appendix to the Government's answer brief filed in the lower appellate court in this case.

Petitioner Schery was released much earlier than expected. In the year 2004, New York enacted the Drug Law Reform Act,

(Continued on following page)

Schery ended up serving thirteen years and one month, i.e., 157 months, on his New York sentence measured from April 5, 1994.

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2004 N.Y. Laws Ch. 738. Subsection 23 of that new law permitted a trial court to resentence a defendant, who had been sentenced to an indeterminate sentence of at least fifteen years, to be resentenced to a determinate number of years of imprisonment with full credit for time already served.

Because Mr. Schery qualified under this new law, a New York Supreme Court judge signed an order on May 23, 2006 resentencing Mr. Schery to a determinate sentence of seventeen (17) years. That order noted that the People of New York did not dispute that defendant Schery had a good institutional record since being incarcerated and that defendant Schery was remorseful. The trial judge stated in her order this had been defendant Schery's first conviction, that defendant Schery had at that time "been imprisoned for approximately ten years since sentence was imposed and in that time has been an exemplary inmate." The judge counterweighted that positive assessment with the fact that, during his New York guilty plea proceeding, defendant Schery admitted his involvement on at least a managerial level and that a significant amount of narcotics and illegal drug proceeds were involved. For that reason, the trial judge concluded "that a resentence to a determinate term close to the maximum authorized by law" was the appropriate disposition.

In that resentencing order, the New York judge noted that defendant Schery had been sentenced in federal court on September 13, 2000 and that this federal sentence was to run concurrently with that State of New York sentence. The New York judge expressly stated that this resentence was to be "concurrent with defendant's Federal sentence of 188 months and all concurrent time that defendant had accumulated toward the satisfaction of the now vacated sentence shall be applied to the resentence. The defendant should not lose any concurrent time due to the resentence."

Now in federal custody, petitioner Schery obtained a sentencing computation from the Bureau of Prisons. This computation, dated August 24, 2007, determined that petitioner Schery was projected for release on May 6, **2014**.[6] Such a computation meant that the Bureau of Prisons was calculating the one hundred eighty-eight (188) months beginning on September 13, 2000 and not beginning on April 4, 1994. Simply stated, petitioner Schery was not getting the credit from the Bureau of Prisons for his incarceration in New York beginning on April 5, 1994 as orally pronounced by Judge Roettger on September 13, 2000.

On February 25, 2008, defendant Schery filed a *pro se* "Motion For Court To Amend And Correct Its Own Judgment Of September 20, 2000." Under Supreme Court precedent, a *pro se* pleading from a prisoner is to be liberally construed. *Haines v. Kerner*, 404 U.S. 519 (1972); *Boag v. MacDougall*, 454 U.S. 364 (1982). Succinctly stated, petitioner Schery referred the trial court to his sentencing transcript

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[6] In his subsequently filed *pro se* motion "to amend and correct" his judgment, petitioner Schery stated this date. The actual government-generated document was filed in the trial court as an exhibit to a defense motion that preceded the one that is the subject of this litigation. That same release date still appears on the Federal Bureau of Prisons web site, when using the inmate locator for petitioner Wilfredo Schery. One hundred eighty-eight months measured from September 13, 2000 would end in May of 2016. However, federal prisoners generally actually serve about eighty-five per cent of the months imposed at sentencing.

and, more particularly, to Judge Roettger's oral pronouncement that Schery should receive credit for the time served with the New York authorities. Schery observed that the final judgment in his case did not indicate what was orally stated by Judge Roettger. Schery repeatedly referred the successor judge to United States Sentencing Guideline 5G1.3(b) and cited *Witte v. United States*, 515 U.S. 389 (1995). Mr. Schery requested that the trial court make "the simple correction of the judgment and commitment order to indicate the court's intent." According to Mr. Schery, the court, not the Bureau of Prisons, must make this correction.

The Government never filed a response to this motion. The trial court did not hold a hearing. The next action was filing of a written order from a successor judge that denied Mr. Schery's *pro se* motion. That order is set out in its entirety at App. 7-9. The district court judge conceded that Mr. Schery's sentencing transcript established that Judge Roettger expected Mr. Schery to receive credit for the time Schery already served in New York before he was taken into federal custody. That was not reflected in the written judgment. Conceding that the oral pronouncement of a sentence controls in the face of a conflict between the oral pronouncement of the sentence and the written judgment,[7] the trial court

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[7] This legal principle appears in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936).

ruled that "Judge Roettger did not have the authority to give Mr. Schery credit for time *previously* spent in New York custody against the New York sentence." Based on that legal ruling, the district court ruled that "there is no legal basis for amending or correcting the judgment." In that order, the successor judge made no mention of either United States Sentencing Guideline 5G1.3 or *Witte v. United States*, *supra*.

Petitioner Schery filed a *pro se* motion for reconsideration. The essence of this motion was that the trial court did have legal authority pursuant to Guideline 5G1.3(b). Mr. Schery repeatedly cited that provision.

The successor judge filed an order denying Schery's motion for reconsideration. That last order is contained at App. 10-11. The trial judge again ignored United States Sentencing Guideline 5G1.3 and based his legal ruling on Title 18 United States Code section 3585(b) that provided that Schery could not get credit from the Bureau of Prisons for time that had been credited against another sentence. Consequently, since New York gave Schery credit against Schery's New York sentence, Schery was "not entitled to any credit on his federal sentence."

Schery appealed, now obtaining counsel to assist him. The opinion of the lower appellate court is set out in its entirety at App. 1-6. For the first time in this litigation, the federal appellate court ruled that the trial court lacked subject matter jurisdiction to

entertain a motion pursuant to Federal Rule of Criminal Procedure 36 to correct Schery's criminal judgment. That appellate court ruled that Rule 36 "ensures that the judgment is in accord with the court's unambiguous oral sentence" and only "covers 'minor, uncontroversial errors'" but "may not be used to modify a sentence in a substantive way." The ultimate legal holding declared for Schery's dilemma was: "Because appellant seeks a substantive change to his sentence, absent an unambiguous oral directive at sentencing, the district court did not have jurisdiction under Rule 36 to entertain appellant's motion." App. 4.

Mr. Schery filed a petition for a panel rehearing. That pleading argued that the error involved in this appeal was within the ambit of Federal Rule of Criminal Procedure 36. Judge Roettger's sentencing transcript was unambiguous as to what Judge Roettger orally pronounced regarding the giving of credit to Schery for the time Schery had already served on his State of New York drug conviction. That credit did not appear only because of "oversight or omission." Correction of this judgment would not involve a substantive change. A substantive change in the sentence would be a request for the first time **after** the sentencing hearing for the trial judge to give credit for time served for the New York sentence prior to Mr. Schery being taken into federal custody. It would also be a substantive change in the sentence if the judge **did not** orally express his intent **during** the sentencing hearing that Mr. Schery should be

given credit for time served for the New York sentence prior to Mr. Schery being taken into federal custody. It would be a substantive change if the trial judge only had a **secret unstated** intention that Mr. Schery be given credit for time served for the New York sentence prior to Mr. Schery being taken into federal custody. Finally, it would be a substantive change if the judge made an error of law and **did not** realize **at the sentencing** hearing that he, that judge, had legal authority to give Mr. Schery credit for time served on the New York sentence. The latter error would be appealable following the entry of judgment. Because the transcript of the sentencing hearing established that none of those situations existed in this case, Mr. Schery was not requesting a substantive change in the sentence he received at this sentencing hearing on September 13, 2000. For that reason, the successor district court judge had jurisdiction to alter the judgment pursuant to Federal Rule of Criminal Procedure 36.

The appellate court denied rehearing without explanation. (App. 12-13).

If petitioner Schery was granted the relief he requested, Mr. Schery's federal sentence measured for 188 months from April 5, 1994 would expire in December of 2009, even if Mr. Schery was compelled by the Bureau of Prisons to serve every day of that 188 months. In truth, given Mr. Schery's behavior both in the New York prison and the federal institution at which he is presently confined, Mr. Schery would be entitled to immediate release at this

time, because a federal prisoner who conducts himself well during his imprisonment does not have to serve every day of the written sentence. Mr. Schery cannot advise this Court of what that release date would have been if the district court finally is ordered to alter his criminal judgment and the Bureau of Prisons then recalculated Mr. Schery's projected release date.

## REASONS FOR GRANTING THIS PETITION

Federal Rule of Criminal Procedure 36 became effective on March 21, 1946.[8] 327 U.S. 821, 856. That rule read: "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

This Court has never interpreted Rule 36 since it went into effect. The notes of the Advisory Committee On Rules stated in the year 1944: "This rule continues existing law. Rupinski v. United States, 4 F.2d 17 (C.C.A. 6th). This rule is similar to Rule 60(a)

[8] An earlier version of federal rules of criminal procedure that concerned post-verdict procedure and which was promulgated in 1934, did not contain any provision comparable to Rule 36. 292 U.S. 659-662.

In 2002, only stylistic changes were made to Federal Rule of Criminal Procedure 36 with the intent of making that rule more easily understood. No substantive change was made.

of the Federal Rules of Civil Procedure (28 U.S.C., Appendix)."

The applicable portion of *Rupinski v. United States*, 4 F.2d 17 (6th Cir. 1925) is almost worthless for discerning the scope of Rule 36. That case addressed a simple clerical error as to whether Count 2 or Count 3 of an indictment had been dismissed. All that the *Rupinski* opinion stated as a general rule was that a trial court had power after the term of court to alter the record "in the case of mere clerical errors." More is needed to advise trial courts of the extent of their power to act pursuant to Federal Rule of Criminal Procedure 36.

Those lawyers and judges who knew in the year 1944 what the "then existing" law was are no longer alive. Nevertheless, the scope of this rule must be understood to permit it to be correctly applied to varying factual situations. Otherwise, application of Rule 36 becomes arbitrary and lacking in any definite standard that can be consistently applied by all lower courts.

Petitioner believes that there is evidence of what that advisory committee meant. However, presently, there is no statement from this Court as to whether that evidence accurately establishes the jurisdiction of a federal district court to utilize Federal Rule of Criminal Procedure 36.

*Ins. Co. v. Boon*, 95 U.S. 117 (1877) addressed the power of a trial court to correct the record regarding a nonjury trial and incorporate *nunc pro tunc* a special

finding of facts upon which the judgment of that trial court was based. This Court announced the following then-governing rule of law:

> * * * It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, . . . , the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term. * * * "The old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, convenience, and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our books. . . ." Even judgments may be corrected in accordance with the truth. * * * Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; but every court of record has power to amend its records, so as to make them conform to and exhibit the truth. Ordinarily, there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or any thing that satisfactorily shows what the truth was. Within these rules, we think, was the order made at September Term,. . . . It was but an amendment or correction of form, the form of the finding, not its substance, and there was enough to amend by. * * * The amendment or

> correction, therefore, contradicts nothing in the record as made at April Term, and it is in strict accordance with the truth. * * *
>
> In so holding, we do not depart from any thing we have ever decided respecting the power of a court to make up a case, after the expiration of a term, for bills of exceptions not claimed at trial. This is not a case of that kind. It is the case of a correction of the record, not merely an allowance of exceptions never taken, and necessary to have been taken, to bring an interlocutory ruling upon it. We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. Could he allow it, the record would be made to speak falsely.

*Id.* at 125-127.

*In re Wright*, 134 U.S. 136 (1890) was a criminal case. The defendant challenged the authority of the circuit court to enter an order *nunc pro tunc* to show that the circuit court had remanded the case to the district court prior to the time that the district court sentenced the prisoner, thereby establishing that the district court had jurisdiction to sentence the prisoner on the date of the sentencing proceeding. This Court opined:

> * * * Mr. Bishop, in his first volume on Criminal Proceedings, section 1160, states the doctrine in the following terms:

"When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of the court, for instance, cannot be opened, and modified, or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk, proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way. So of the mistake of the clerk in the name of the judge before whom the indictment was found."

The present case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply some omission in the record of what was done at the time of the proceedings. An extensive list of authorities . . . support the power of the court to make a record of some matter which was done at a former term, of which the clerk had made no entry,. . . .

. . . [I]n Blackstone's Commentaries . . . [t]his Blackstone declared, meant only that the justices should not by their own private rasure [i.e., erasure] change a record already

> made up, or alter the truth to any sinister purpose.
>
> *Id.* at 143-144.

Several subsequent Supreme Court cases, which were decided prior to the year 1946, follow the concepts established in *Boon*, *supra*, and *Wright*, *supra*. *Bronson v. Schulten*, 104 U.S. 410 (1882) held that seventeen years after it was initially entered, a lower court lacked power to vacate a judgment to permit an increase in the amount of damages. *Gagnon v. United States*, 193 U.S. 451 (1904) held that thirty-three years after the fact, a court had no power to create a judgment when there was no existing evidence of its prior existence. *United States v. Mayer*, 235 U.S. 55 (1914) held that in a criminal case a district court lacked the power to correct errors of law by a motion for a new trial filed after a term of court ended and, in so doing, undo the judgment of conviction.

If those decisions of this Court were intended to define the jurisdiction of a federal district court to act pursuant to Federal Rule of Criminal Procedure 36, the facts of petitioner Schery's case would show that the district court had jurisdiction eight years later to make the judgment speak the truth of what was documented by the transcript of the sentencing proceeding that, on September 13, 2000, Judge Roettger's sentence included giving petitioner Schery credit for all of the time served in a New York penal facility from April 5, 1994 until the date of that

federal sentencing held on September 13, 2000. A successor judge would not be doing for the first time what was not done by Judge Roettger on September 13, 2000. A successor judge would not be erasing what had been done by Judge Roettger on September 13, 2000. The district court was not being asked to acquit defendant Schery or impose a new sentence not actually uttered on September 13, 2000. At present, the record does not speak the truth of what was actually done on September 13, 2000.

Both the Government and criminal defendants utilize Federal Rule of Criminal Procedure 36. There is a need for this Court to construe Rule 36 and establish the concepts contained in the words of that rule of procedure so that it may be applied to any factual situation before a district court. At present, there is conflict among the circuits as to the jurisdictional limits imposed by Federal Rule of Criminal Procedure 36. *E.g.*, *United States v. Quinero*, 2009 U.S. App. LEXIS 15368 (7th Cir. 2009); *United States v. Bennett*, 423 F.3d 271 (3d Cir. 2005). More to the point, the lower appellate court's opinion conflicts with the decision in *United States v. Spencer*, 513 F.3d 490 (5th Cir. 2008), which stated that Rule 36 permitted a district court more than ten years after entry of the criminal judgment to conform its prior written judgment to the oral announcement of the sentence. Finally, the lower court's opinion conflicts with *United States v. Mojabi*, 161 F. Supp. 2d 33 (D. Mass. 2001) on the very issue involved in this case. *Mojabi* utilized Federal Rule of Criminal

Procedure 36 to give a defendant credit for time served on a state conviction pursuant to United States Sentencing Guideline 5G1.3, although the written judgement stated the sentence to be 70 months, but did not reflect a reduction for 15 months of credit for the time served on that state sentence. "The reference to § 5G1.3 in the oral sentence, when considered in the context of the entire sentencing proceeding, demonstrates a clear intention to award credit. . . ." *Id.* at 36.

Because Federal Rule of Criminal Procedure 36 is much used by both the Government and criminal defendants, this Court should decide the meaning of Rule 36 and the parameters of a trial court's jurisdiction under that rule.

## CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR JOEL BERGER
*Counsel for Petitioner*
12531 SW 124 Path
Miami, Florida 33186
Phone: (305) 235-2050

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 08-14613
Non-Argument Calendar

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D. C. Docket No. 95-00481-CR-AJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILFREDO SCHERY,
a.k.a. Carlos,
a.k.a. Wolf,
a.k.a. Wolfy,
a.k.a. Benjamin Bloom,

Defendant-Appellant,

Home Savings of America, F.S.B.,

Claimant,

---

Appeal from the United States District Court
for the Southern District of Florida

---

(April 16, 2009)

Before TJOFLAT, MARCUS and ANDERSON, Circuit Judges.

PER CURIAM:

On April 2, 1997, a Southern District of Florida grand jury returned a multi-count indictment against appellant and others.[1] At the time, appellant was serving a prison sentence of 20 years to life in the State of New York. On December 21, 1998, appellant, pursuant to a plea agreement, pled guilty to Count 2 of the indictment.[2] On September 29, 2000, the district court sentenced appellant to a prison term of 188 months, to be served concurrently with his New York sentence.[3]

On February 25, 2008, appellant, proceeding *pro se,* moved the court to "amend and correct its own judgment of September 20, 2000."[4] He argued that the district judge who had imposed the sentence intended that he "receive credit for the entire 'time served with the New York authorities,'" but mistakenly failed to execute his intent on the judgment

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[1] This was the third superceding indictment.

[2] This was Count 2 of the fourth superceding indictment, which was identical to Count 2 of the previous indictment.

[3] The court signed the judgment on September 19, 2000; the clerk entered it on docket the next day.

[4] The same day, appellant moved the court to vacate his sentence pursuant to 28 U.S.C. § 2255 on the ground that his attorney had rendered ineffective assistance of counsel at sentencing. The court dismissed the motion without prejudice on appellant's motion on September 26, 2008.

of commitment. The district court denied the motion on April 3, 2008, concluding that the motion lacked a legal basis. The court acknowledged that the sentencing judge had stated at sentencing that he expected appellant to receive credit for the time already served in New York before he was taken into federal custody, but that the written judgment did not so provide. The court further stated that although a district court's oral pronouncement at sentencing generally prevails over a conflicting provision in the court's written judgment, the sentencing judge lacked authority to credit appellant for time spent in New York custody before he was taken into federal custody. On April 3, 2008, appellant moved the court for reconsideration. The court denied his motion on August 5, 2008. Appellant now appeals the district court's April 3 and August 5 orders, contending that pursuant to 18 U.S.C. § 3584 and U.S.S.G. § 5G1.3, the sentencing judge intended and was authorized to credit against his federal sentence 77 months that he served in state prison prior to the imposition of his federal sentence, and that the September 20, 2000 judgment should be amended to reflect the sentencing judge's intent.

I.

Our first task is to determine whether the district court had subject matter jurisdiction to entertain appellant's motion. Whether the court had jurisdiction to "amend and correct" the judgment is unclear. Appellant's motion states that it was filed

pursuant to Federal Rule of Criminal Procedure 47(a) and (b). That rule provides general requirements for all motions, but does not provide a basis for jurisdiction. The motion suggested alternatively that the court was authorized to correct its own errors pursuant to Federal Rule of Civil Procedure 60(b)(6), which provides a basis for a party to seek relief from a final judgment in a civil case, not a criminal case.

Federal Rule of Criminal Procedure 36 provides that "the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." This rule ensures that the judgment is in accord with the court's unambiguous oral sentence. *United States v. Bates,* 213 F.3d 1336, 1340 (11th Cir. 2000). It covers "minor, uncontroversial errors." *Portillo,* 363 F.3d at 1164 (11th Cir. 2004) (quotation omitted). However, it may not be used to modify a sentence in a substantive way. *United States v. Whittington,* 918 F.2d 149, 150-51 (11th Cir. 1990).

Because appellant seeks a substantive change to his sentence, absent an unambiguous oral directive at sentencing, the district court did not have jurisdiction under Rule 36 to entertain appellant's motion.

II.

To the extent that appellant contends that the sentencing judge made a substantive error in imposing sentence, he could have sought relief under

42 U.S.C. § 2255. A district court is authorized to recharacterize a *pro se* motion for relief from a criminal judgment as a § 2255 motion. *Castro v. United States,* 540 U.S. 375, 382-83, 124 S.Ct. 786, 792, 157 L.Ed.2d 778 (2003); *Outler v. United States,* 485 F.3d 1273, 1279 (11th Cir. 2007), *cert. denied,* 128 S.Ct. 1443 (2008). In fact, the court has "an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan,* 915 F.2d 622, 624-25 (11th Cir. 1990). Moreover, we have suggested that, where a prisoner disputes a district court's application of U.S.S.G. § 5G1.3 in fashioning his sentence, the proper remedy is a § 2255 motion. *See Coloma v. Holder,* 445 F.3d 1282, 1285 n.4 (11th Cir. 2006). *See also Preiser v. Rodriguez,* 411 U.S. 475, 490, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973) (holding appropriate remedy for state prisoner attacking length of confinement is habeas corpus relief).

Here, appellant attacks the duration of his sentence. The 77-months' reduction he seeks may be appropriately construed as a motion to vacate. However, it does not appear that the district court explored the possibility of construing his motion to amend and correct as a § 2255 motion. The court should have explored this possibility, including whether appellant's claim is cognizable in a § 2255 motion, whether the motion was time-barred under 28 U.S.C. § 2255(f), and whether the claim is procedurally defaulted. To enable the court to consider

these questions, we vacate its judgment and remand the case for further proceedings.

VACATED and REMANDED.

Case 1:95-cr-00481-AJ Document 778
Entered on FLSD Docket 04/03/2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 95-481-CR-JORDAN

UNITED STATES OF AMERICA )
vs. )
WILFREDO SCHERY )

**ORDER DENYING MOTIONS TO AMEND/CORRECT JUDGMENT/SENTENCE**

Mr. Schery's pro se motion to amend/correct his judgment/sentence [D.E. 768] ([D.E. 9 in Case No. 07-22862-CIV-JORDAN]) is DENIED for the reasons which follow.

Mr. Schery wants his judgment amended to give him credit on his 188-month federal sentence for the approximately three years he spent in custody in New York on a partially related state narcotics charge. Mr. Schery correctly points out that Judge Roettger, at the sentencing hearing, stated that he expected Mr. Schery to receive credit for the time he had already served in new York before he was taken into federal custody. *See* Sent. Tr. At 10. Judge Roettger ordered that Mr. Schery's federal sentence run concurrent with his New York sentence, which still had time left at the time of the federal sentencing hearing. *See*

Judgment [D.E. 655] at 2. The judgment, however, did not provide for Mr. Schery receiving credit for the time he spent in New York custody prior to being taken into federal custody.

When the oral pronouncement of sentence conflicts with the written judgment, the oral pronouncement controls, *See, e.g., United States v. Portillo,* 363 F.3d 1161, 1165 (11th Cir. 2004). But the problem is that Judge Roettger did not have the authority to give Mr. Schery credit for time *previously* spent in new York custody *before* he was taken into federal custody. This is because Mr. Schery received credit for that prior time spent in New York custody against the New York sentence. *See* 18 U.S.C. § 3585(b). A "prisoner cannot *retroactively* receive federal credit for time previously served in state prison, because 'sentences [cannot] be concurrent in the sense of having the same starting date because a federal sentence cannot commence prior to the date it is pronounced, even if made concurrent with a sentence already being served,'" *Dominguez v. Williamson,* 2001 WL 300705, * (5th Cir. 2001 (quoting *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980)). As a result, there is no legal basis for amending or correcting the judgment.

DONE and ORDERED in chambers in Miami, Florida, this 14th day of March, 2008.

/s/ Adalberto Jordan
Adalberto Jordan
United States District Judge

cc: Counsel of record
Wilfredo Schery, pro se, #40808-054, SR3-47U, FCI, 1900 Simler Avenue, Big Spring, Texas 79270

Case 1:95-cr-00481-AJ Document 786
Entered on FLSD Docket 08/05/2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 95-00481-CR-JORDAN

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| Plaintiff | ) |
| vs. | ) |
| WILFREDO SCHERY, | ) |
| Defendant | ) |

**ORDER**

Mr. Schery filed a *pro se* motion/letter for reconsideration of the order denying his motion to correct sentence, primarily arguing that Judge Roettger had the authority to grant him credit time served. I disagree. Under 18 U.S.C. § 3585(b), Mr. Schery could only get credit for time "that has not been credited against another sentence." *See U.S. v. Kiefer*, 20 F.3d 874, 876 n.1 (8th Cir. 1994) (citing *United States v. Dennis*, 926 F.2d 768, 770 (8th Cir. 1991)). *See also Dominguez v. Williamson*, 2001 WL 300705, * 2 (5th Cir. 2001). Because the approximately three years he served in New York were credited against the non-concurrent state sentence,

Mr. Schery is not entitled to any credit on his federal sentence.

Accordingly, the motion for reconsideration [D.E. 779] is DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 4th day of August, 2008.

/s/ Adalberto Jordan
Adalberto Jordan
United States District Judge

cc: All counsel of record

Wilfredo Schery, pro se,
No. 40808-054, Flightline, Unit G-10
2001 Rickabough Drive
Big Spring, Texas 79720

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

---

No. 08-14613-CC

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILFREDO SCHERY,
a.k.a. Carlos,
a.k.a. Wolf,
a.k.a. Wolfy,
a.k.a. Benjamin Bloom,

Defendant-Appellant,

Home Savings of America, F.S.B.,

Claimant.

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On Appeal from the United States District Court
for the Southern District of Florida

---

(Filed May 21, 2009)

Before: TJOFLAT, MARCUS and ANDERSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

Case 1:95-cr-00481-AJ Document 651
Entered on FLSD Docket 09/13/2000

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 95-481-CR-ROETTGER (s)(s)(s)(s)

UNITED STATES OF AMERICA, *
*
vs. *
WILFREDO SCHERY, et al., *
*
Defendants. *

**DEFENSE SENTENCING MEMORANDUM AND BRIEF IN SUPPORT OF SENTENCING MITIGATION**

(Filed Sept. 11, 2000)

COMES NOW the Defendant, WILFREDO SCHERY, by and through his undersigned counsel and pursuant to Rule 32(c)(3)(a) of the *Federal Rules of Criminal Procedure* and U.S.S.G. §6A1.3, and files his written objections to the pre-sentence report in this matter. Further, the defendant Wilfredo Schery, pursuant to Section 5G1.3(b) and 5K2.0 of the United States Sentencing Guidelines, and Title 18 U.S.C. §3553(b), moves this Honorable Court to impose a sentence that is (a) below the guideline range applicable in the instant case and (b) concurrent with a term of imprisonment imposed upon him in a related case. For grounds, the defendant would aver: [1]

DEFENDANT'S OBJECTIONS TO
PRE-SENTENCE REPORT
Page 2, paragraph 2:

For the reasons which have previously been stated in numerous defense pleadings relating to double jeopardy and government misconduct, Mr. Schery notes that there is a related case to wit: Supreme Court of the State of New York vs. Wilfredo Schery, New York Indictment No. 2896/94. Whether or not the instant case is barred by double jeopardy, there is no question that this case and the New York case are "related," where there exists a clear commonalty of the description of the offense, the nature and scope of the activity, the statutory offenses, the person acting as conspirators, as well as an overlapping time period in both charging documents.

MOTION FOR DOWNWARD DEPARTURE
AND/OR CONCURRENT SENTENCE BASED
UPON *WITTE V. UNITED STATES*

As has been alleged, realleged and proven beyond cavil, the instant case arises out of the very same conspiratorial conduct that formed the basis for the indictment, plea and conviction of Mr. Schery in the case in New York. Mr. Schery's conviction in that case resulted in the imposition of a twenty years to life prison term. The PSI fails to take into account that judicial notions of fairness and equity justify a departure in cases such as this. Worse, because three criminal history points have been assessed against Mr. Schery as a result of his conviction in the New

York case, his resultant criminal history category of IV the PSI [2] *overstates* the seriousness of Mr. Schery's past criminal conduct. (See U.S.S.G. 4A1.3).

CONCURRENT SENTENCE

Paragraph 66 of the pre-sentence report correctly notes that pursuant to U.S.S.G. §5G1.3(c), "if the court deems that imposing a consecutive sentence in light of the seventeen months the defendant served on the civil contempt conviction is not 'a reasonable punishment for the instant offense,' the court can impose a sentence for the instant offense to run concurrent, partially concurrently, or consecutively to the prior undischarged term of imprisonment . . . so as to achieve a reasonable punishment."

It is respectfully submitted that, while the pre-sentence report is literally correct in noting the potential applicability of §5G1.3(c), the instant case is governed instead by §5C1.3(b), which appears to expressly apply to this case. Subsection (b) states:

If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense *shall* be imposed to run concurrently to the undischarged term of imprisonment. (emphasis supplied)

In pertinent part, application note 2 to the commentary under §5G1.3 states that, "[w]hen a

sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct [3] taken into account in determining the sentence for the instant offense.

Utilization of U.S.S.G. §5G1.3(b) was specifically endorsed by the United States Supreme Court in a case analogous to the instant matter. In *Witte v. United States,* ___ U.S. ___, 115 S.Ct. 2199 (1995), the United States Supreme Court turned back Witte's challenge to an indictment based upon violation of the double jeopardy clause. There, Witte was indicted in 1991 for conspiring and attempting to possess with intent to distribute marijuana. In sentencing the defendant, the court considered as relevant conduct under Section 1B1.3 of the Sentencing Guidelines an uncharged importation of more than one thousand kilograms of, cocaine, resulting in a sentence greater than that which would have been imposed had the court not considered Witte's cocaine related activities as relevant conduct.

In 1992, another grand jury indicted Witte for the very cocaine-related offenses that had been considered as relevant conduct at his sentencing in the first case. Witte moved to dismiss, arguing that because he already been punished for the cocaine-related offenses, further punishment for these offenses would violate the double jeopardy clause. Although the Supreme Court held that the double jeopardy clause did not in fact protect Witte from the second indictment and punishment thereon, the court

found that "[s]ignificant safeguards built into the Sentencing Guidelines . . . protect petitioner against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct." Id., 115 S.Ct. at 2209.

The Supreme Court stated: [4]

> . . . §5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence. If a defendant is serving an undischarged term of imprisonment "result[ing] from offense(s) that have been fully taken into account [as relevant conduct] in the determination of the offense level for the instant offense," §5G1.3(b) provides that "the sentences for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." And where §5G1.3(b) does not apply, an accompanying policy statement provides, "the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense." U.S.S.G. §5G1.3© (policy statement) *Id.*, at 2208-09.

Witte was recently applied by the Eighth Circuit Court of Appeals in *United States v. Gardner,* 65 F.3d 82 (8th Cir. 1995). There, as in *Witte,* the Eighth Circuit turned back a challenge to a second indictment based upon double jeopardy grounds. Although denying relief on that basis, the court stated:

> Protection from excessive punishment in this scenario lies in §5G1.3 of the Sentencing Guidelines, which permits the district court to coordinate and approximate the sentences as if all the offenses had been brought in the same proceeding, rather than in the constitutional proscription against double jeopardy.

*Id.* at 87. See also: *United States v. O'Dell,* 713 F.2d 421, 422 (8th Cir. 1983) (per curiam) (inviting district court to reconsider propriety of consecutive sentences from mail fraud offenses involving a single fraudulent scheme.)

DOWNWARD DEPARTURE

Title 18, U.S.C., §3553(b) requires the sentencing court to impose a [5] sentence within the prescribed guideline range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Under the Guidelines, the sentencing court must "treat each guideline as a carving out a 'heartland' type case, that is a set of typical cases embodying the conduct that each guideline described." *United States v. Gonzalez-Lopez,* 911 F.2d 542, 529 (11th Cir. 1990). However, Sentencing Guideline §5K2.0 grants the sentencing court discretion to impose a sentence outside the prescribed guideline range if a case presents

circumstances or factors previously not considered or inadequately considered by the Sentencing Commission. Thus, a sentencing court has the authority to depart downward if it is persuaded the defendant's case "truly was atypical ... where conduct significantly differs from the norm ... " *United States v. Hadaway,* 998 F.2d 917, 920 (11th Cir. 1993) (Remanding case to district court for reconsideration of request for downward departure on this basis.)

As an alternative to the imposition of a concurrent sentence, the Supreme Court in *Witte v. United States, supra,* 115 S.Ct. 2199, found that a downward departure was available to those defendants who, although not coming within the ambit of the double jeopardy clause's protection against multiple punishments, nonetheless were confronted with the possibility that their conduct might give rise to consecutive terms of punishment.

> Even if the Sentencing Commission had not [6] formalized sentencing for multiple convictions in this way, district courts under the Guidelines retain enough flexibility in appropriate cases to take into account the fact that conduct underlying the offense at issue has previously been taken into account in sentencing for another offense. As the Commission has explained, "[u]nder 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a

degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S.S.G. §5K2.0. *Id.* at 2209.

Respectfully submitted,

NATHAN P. DIAMOND, ESQ.
1221 Brickell Avenue
Suite 1020
Miami, Florida 33131
(305) 371-5300

By: /s/ Nathan P. Diamond
NATHAN P. DIAMOND,
ESQUIRE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail this 8th day of September, 2000 to Mary V. King, Assistant United States Attorney, 8245 N.W. 53rd Street, Suite 101, Miami, Florida 33166.

/s/ Nathan P. Diamond
NATHAN P. DIAMOND,
ESQUIRE [7]

Case 1:95-cr-00481-AJ Document 783
Entered on FLSD Docket 04/28/2008

Wilfredo Schery # 40808-054
Flightline Unit; D-10
2001 Rickabaugh Drive
Big Spring, TX 79720

**Clarence G. Maddox II, District Clerk**
**301 N. Miami Ave., Room 150**
**Miami, FL 33128-7788** **April 21, 2008**

**RE: NOTICE OF FILING SENTENCING TRANSCRIPTS**
**CASE NO: 95-481-CR-NCR**

(Filed Apr. 28, 2008)

Dear Mr. Maddox,

I wish to respectfully request that the attached sentencing transcripts be docketed for the above reason.

Thank you for your time in this matter.

Respectfully,

/s/ Wilfredo Schery
Wilfredo Schery # 40808-054

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | CASE NUMBER: 95-481-CR-NCR |
| vs. | ) | |
| WILFREDO SCHERY, | ) | |
| Defendant. | ) | |

Transcript of sentence proceedings before the Honorable Norman C. Roettger, United States District Judge, at Miami, Florida, on the 13th day of September, 2000.

APPEARANCES OF COUNSEL: As noted.

Court Reporter: Jerald J. Reeves, RPR

Proceedings recorded by mechanical stenography.

Transcription produced by computer.

[2] THE COURT: Call the case, please.

THE CLERK: The Court calls case 95 481 criminal. United States of America versus Wilfredo Schery.

MR. HUMMEL: Good afternoon, your Honor.

Randy Hummel on behalf of the United States.

THE COURT: Mr. Hummel.

MR. DIAMOND: Good afternoon, sir.

Nathan Diamond appearing on behalf of Wilfredo Schery who is present in the courtroom.

THE COURT: Mr. Diamond.

MR. DIAMOND: Does the Court want him at the podium?

THE COURT: Please.

I have reviewed the pre sentence report. Have you had a chance to go over it thoroughly with your client, Mr. Diamond?

MR. DIAMOND: I have, your Honor.

THE COURT: Are there any objections outstanding at this time?

MR. DIAMOND: They are not of any significance. I did file a document last week. And really the reason for that is it goes to the, the fact of the related cases.

The PSI says that there were no related cases. And I think when Mr. Hummel and Ms. King and I were negotiating this matter in the plea agreement the government had no objection or would have no objection, I would say, to the entry of a concurrent sentence in this case with the case that Mr. Schery [3] had been arrested for in April of 1994 in New York and subsequently sentenced and that appears in the presentence report.

So I think it should have been considered a related case because it was the same conduct.

And I don't have to tell the Court. The Court sat through the trial in this case. But Mr. Cano's organization was rather extensive, Texas, New York and various other areas.

THE COURT: Right. Well, is he doing time on that related case?

MR. DIAMOND: Yes, sir.

THE COURT: And how much time is he doing?

MR. DIAMOND: 20 years to life is what he was sentenced to. And that was in, I believe, it was in 1994 that he was arrested for that and sat in New York. The case was disposed of in New York –

PROBATION OFFICER: May 14, 1996.

MR. DIAMOND: Yes. He was sentenced to 20 years to life and then Mr. Cano had been indicted. And then the Federal Government proceeded with that indictment. And then there was a fourth superseding indictment that brought Mr. Schery before this Court in 1997, about 3 years after his arrest in New York and just at the beginning of the Cano trial, before Mr. Cano chose to go to trial.

So he was sentenced to 20 years to life on the New York [4] activities.

THE COURT: Well, he was arrested with Mr. Silva and Ms. Valencia.

MR. DIAMOND: Yes, sir.

THE COURT: I have heard that she went back to Colombia.

MR. DIAMOND: I am not sure how, but she did. And I don't know what ever happened to Mr. Silva.

I didn't handle any of the New York matters. There was other counsel involved in that case. And that case went through the court system. And ultimately Mr. Schery pled to the New York charges and was sentenced, as I said to the Court, to that type of sentence, 20 years to life.

THE COURT: Very well.

MR. DIAMOND: Based on that being the related case, clearly my request was, and I think the government acceded to the fact or would have no problem with the Court if the Court were so inclined.

And I think that there is plenty of law to support the Court to sentence Mr. Schery to a concurrent sentence.

THE COURT: I don't have any problem with that.

MR. DIAMOND: That being the case, then I guess the only last item would be my request that the Court consider that the deduction of the 3 points

afforded for the criminal history category be taken into consideration.

[5] And I guess under United States versus Witty[e] and under, I believe it is 5G one B, that the Court downward depart. And that is instead of the hundred 88 months that would be the low end of the guideline, that the government and I would be recommending to the Court it be a hundred 68 months. That is if he was a criminal history category one as opposed to the 2 that he turns out to be as a result of the New York conviction which in effect is the same conviction, it would be a hundred 68 months.

I think it is really a matter that is of very little difference. The request is made because he started his New York sentence 3 years before or 2 years before any sentence that is going to be imposed by this Court.

As a result, my understanding of New York law, and I have had a discussion with Mr. Schery, and his lawyer in New York told him something different, but my understanding is he doesn't get before a parole board in New York, not even to be considered, until he has served 20 years.

His lawyer told him that he is considered for parole at 85 percent of 20 years.

So it puts him at about a hundred 68 months I believe which would be consistent with what I am asking this Court to sentence him to. That is a

concurrent sentence that would put him out, if the parole board in New York were even to parole him, and I am not saying that they would, but if they were to parole [6] him it would be considered at about a hundred 68 months.

MR. HUMMEL: Judge, the government took the position in the plea agreement, and I will not deviate from that, in terms of not opposing his request that the sentences be concurrent.

I do take ~~ac~~[ex]ception to downwardly departing from the sentence in this case since this particular case revolves around the conspiracy count in the super[c]eding indictment.

It shows, and we demonstrated through the course of the trial and as part of PSI that Mr. Schery was in fact part of this organization for years and participated in the events in Houston, Texas that formed a part of the conspiracy involving hundreds of kilos of cocaine besides that for which he was ultimately arrested and sentenced for in New York.

And I would object to any further consideration that he gets for that case and that it ought to rest with what the guideline ranges are as they are specified in his PSI presently, one 88 to 2 35.

I think the cases are sufficiently separate and different that that downward departure would not be appropriate.

THE COURT: Well, is it a downward departure or is it simply the 3 level computation?

MR. DIAMOND: It basically becomes – I don't even know how the Court would consider it. Basically it is going from category one to category 2 for the same offense conduct.

In other words, what I am saying is he picked up 3 [7] points as a result of his conviction in New York. He gets 3 criminal history points which kicks him up to a category 2 at level 35. And a category 2, the guideline is one 88 to 2 35.

If New York were not in the picture he would have no criminal history category where he would be at zero in the first cat[e]gory which is one 68 to 2 ten.

THE COURT: So it is not really a departure.

MR. DIAMOND: In essence it is not.

THE COURT: It is simply a computation of the criminal history category.

MR. DIAMOND: Yes, sir.

MR. HUMMEL: I don't think so, Judge, because the criminal history category, and I don't think Mr. Diamond can dispute this, is properly calculated on that sentence. And to drop below that sentence involves departing downward on the criminal history level.

It is a departure that way instead of offense level. But it is still a departure downward from the properly calculated criminal history category.

THE COURT: Well, I think what Mr. Diamond is suggesting is that the criminal history category under the facts involved in this situation should be one rather than 3 because it is all part of the same ball of wax, really. This was part of Cano's conspiracy or Mako's. And the New York operation was set up to accommodate the distribution needs of the Cano slash Mako [8] conspiracy. And that is what it did.

And therefore you are counting as 3 criminal history points what he really pled guilty to in this case.

There is certainly a logical appeal in all of that, I think, or to that.

MR. HUMMEL: One thing is, Judge, it renders this case really a nullity as to him. And the fact of the matter is that this case encompasses a lot more than that case in New York encompassed because it encompasses all of his activities on b[e]h[a]lf of Cano not just in New York but also throughout the country that was demonstrated in the trial.

And I have an opposition to it because it just, to me that is what we end up doing. We are rendering this case here an entire nullity.

THE COURT: I don't know that it is a nullity. He was involved in various aspects of the Cano dash Mako conspiracy, and certainly in Texas as well as New York.

Well, whether it is right or wrong, I think oftentimes I see presentence reports that have the instant offense set forth in other crimes and the criminal history category includes the matters which describe the instant offense in the presentence report.

Isn't that the way it works out, Madam Probation Officer?

PROBATION OFFICER: Your Honor, one reason why the New York arrest was not considered a related case, normally we only [9] include in the related cases federal cases, not state cases. So that is why it is not considered a related case in the instant offense.

THE COURT: Well, whether or not that makes complete justification as to how how it is counted, it is a convenient cutting tool.

Very well. I will leave it as is, count the New York matter as a part of his criminal history category so that it comes out – well, that would cause it to come out one 88 to 2 35 in Mr. Schery's case I think doesn't make any difference. He will probably get through the federal before he gets through with the state matter.

MR. DIAMOND: That being the case – and again I don't agree with Mr. Hummel on the fact that that just renders the federal case a nullity. Clearly if the federal case had come at the same time as the state case it would have been a hundred 68 months.

But what I then would ask the Court to do, based on the Court's finding, is to downward depart by 36 months, the reason being he was arrested in 1994, April 5 of 1994 in New York, and then the Federal Government didn't writ him here until August of 1997, same offense conduct or a portion of that offense conduct, albeit the government takes the position, and again I was not part of the New York case, but it would seem to me that a conspiracy is a conspiracy although the state can only charge in [10] its jurisdiction, although I have yet to see an indictment that doesn't say taking place in, with persons known and unknown to the Grand Jury, taking place in this district and elsewhere.

So again I think he should receive the benefit of the 3 years that he served awaiting for the Federal Government to come in and file their writ against him.

So for that reason I would ask under 5 G one 3 to at least downward depart by the 36 months that the State of New York had him while the Federal Government could have had him.

I think he should receive credit for time ~~in~~ [he] served in this matter. But sometimes that is difficult to achieve because of the varying regulations in the prisons, especially where there is more than one jurisdiction involved.

**THE COURT: But it is the expectation of this Court that he receive credit for the time served with the New York authorities, for the**

**sentence he received up there in the New York operation of the Cano Mako conspiracy.**

**And I will put something in the J and C to that effect, if you would like,** because I am not sure where he is going to be committed, if he is going to be in a federal institution or a state institution.

MR. DIAMOND: Well, I would ask if the Court can to put in the J and C that he remain in the federal system if that is possible.

THE COURT: Well, there is some magic language that [11] has to be used to accomplish that, I think. And I am not sure exactly what that is at this point.

MR. DIAMOND: Whatever language, certainly coming from the Court would be a lot more persuasive to the Department of Justice or the Bureau of Prisons than anywhere else.

I think some language to the effect that his sentence is to run concurrent and to be served in a federal institution if that is at all possible.

THE COURT: I will be happy to put that language in the J and C.

Anything further in the way of allocution, sir?

MR. DIAMOND: No, your Honor.

I know that Mr. Schery has written a letter to the Court. He has consistently, at least in the time that I

have known him, consistently accepted his responsibility for the matters for which he stood accused and to which he pled. He is truly remorseful and sorry for his conduct and his activities. And think he understands he is paying a great price for it.

Do you want to say something to the Court?

THE COURT: Well, I would like to see the letter.

MR. DIAMOND: I think it was included in the presentence report.

THE COURT: It is not separate?

MR. DIAMOND: No, not separate.

THE COURT: I have not seen a separate letter. I [12] know that.

MR. DIAMOND: I think it appears on page 11 of the pre sentence report.

THE DEFENDANT: Your Honor, I don't need to take up any more of the Court's time. But I do want to express my remorse over my past actions. I am constantly reminded every day of what I did. In fact I will go as far as as to say I don't allow myself to forget what I have done.

I do take responsibility. In fact I was brought up to take responsibility over actions that I commit whether knowingly or unknowingly. In this case I did know.

And I do wish to express just how sorry I am over my actions. And being that I do know and recognize what I have done, I do in fact take responsibility for my actions.

I wish that you look down upon this in a sincere manner. And I am sure that whatever sentence you may render upon me, I am sure that it will be just.

Thank you.

THE COURT: You speak English with no accent. Where did you learn it?

THE DEFENDANT: I was raised here, sir. I came here when I was 4.

THE COURT: You came here when you were 4?

THE DEFENDANT: That is correct.

THE COURT: Are you able to speak Spanish?

[13] THE DEFENDANT: Yes, sir.

THE COURT: Only a little?

THE DEFENDANT: My mother doesn't allow me to speak any other language other than Spanish in front of her.

THE COURT: Very well. Let me read one thing before we proceed further.

In the sentencing guideline, 5 G one 3 B, for example, they talk about the instant offense shall be imposed to run concurrently to instead of concurrently with the undischarged term of imprisonment. And you send a J and C off to the Bureau of Prisons that says concurrently to or consecutive with and you will get an inquiry back from the Bureau of Prisons almost immediately. It says what did you mean, Judge. Is it to be consecutive to or concurrent with. I think this has to be concurrent with here.

Anything further from the defendant?

MR. DIAMOND: No, sir.

THE COURT: Let me hear from government. Does the government have anything to add?

MR. HUMMEL: No, your Honor. The government's position is set forth in the plea agreement.

We have agreed that we would not oppose the bottom of the guideline of one hundred and 88 months. And we stand by that.

THE COURT: The imprisonment range under the [14] guideline is a hundred 88 to 2 hundred 35 months. Probation is not authorized. Fine range is 20 thousand dollars to 4 million dollars. Supervised release period of 5 years is imposed.

Well, I have considered the statements of all parties. I have reviewed the pre sentence report. And I am going to impose a sentence within the guideline imprisonment range.

I find that a sentence at the low end of the guideline range will provide sufficient punishment and deterrence.

It is the finding of the Court that the defendant is unable to pay a fine although he may be able to pay a fine within the inmate financial responsibility program. However, I don't choose to impose it.

Pursuant to the Sentencing Reform Act of 1984 it is the judgment of the Court that the defendant Wilfredo Schery – is that you, sir?

THE DEFENDANT: That is correct, sir.

THE COURT: – is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a terms of a hundred 88 months. And that sentence is to run concurrently with the sentence he is presently serving in the New York State system for an offense that was part of the conspiracy in this case.

Upon your release from imprisonment the defendant shall be placed on supervised release for a term of 5 years.

While you are on supervised release you are not to commit any federal, state or local crimes. You are prohibited [15] from possessing a firearm or other dangerous device. And you are not to possess a controlled substance.

In addition you are to comply with standard conditions of supervised release that have been

adopted by this Court and with the following special conditions.

If the defendant is deported he is not to reenter the United States without the express written permission of the U.S. Attorney General. The terms of supervised release shall be non reporting if the defendant resides outside the United States.

And if the defendant should reenter the United States within the term of supervised release he is to report to the nearest U.S. probation officer within 72 hours of his arrival.

The statute requires an assessment of one hundred dollars. And that is due and payable immediately.

Now that sentence has been imposed does the defendant or his lawyer object to the Court's findings of fact or to the manner in which sentence was pronounced?

MR. DIAMOND: No, other than, your Honor, only as we have discussed during this hearing.

THE COURT: You have a right to appeal the sentence imposed. Any notice of appeal must be filed within ten days after the entry of the judgment being entered in this case.

There are procedures available for you to take an appeal even if you don't have the money to pay for it.

Mr. Diamond, please explain to him his appellate rights [16] and the limitations on those rights. And perfect an appeal if he desires to take one.

MR. DIAMOND: Yes, your Honor,

**THE COURT: It is the expectation of the Court that he receive credit for time served under the New York judgment which he is presently serving because it involves part of the acts that were or that constituted part of the conspiracy and possession with intent to distribute and distribution in this case.**

Anything else?

MR. DIAMOND: Yes, your Honor.

The Court indicated that it would put in the J and C that, the language that it would allow him to serve his sentence, the concurrent sentences in the federal system.

THE COURT: Very well. I will direct that he serve his time under this case in the federal system.

MR. DIAMOND: Thank you, sir.

There are 2 other matters that I would like to bring to the Court's attention and that Mr. Schery understands would be a recommendation and a recommendation alone.

His family, the Court knows from the trial, his sister and his mother both are residents of South

Florida. And if the Court would recommend an institution as close as possible to the South Florida area.

THE COURT: I will recom[m]end an institution in South [17] Florida.

MR. DIAMOND: And the other thing is, Mr. Schery has now been in the FDC across the street for approximately, since he was brought down from New York. And he has had difficulty with a knee. And he has attempted to get medical treatment for that knee.

He finally got a commitment for knee surgery. But they wouldn't tell him when. And he anticipates it will be in the next 90 days.

The only thing I would ask the Court to do is stay imposition of the sentence for 90 days so he can get the surgery across the street.

THE COURT: Very well. I am not quite sure what language I use to achieve that. He is already in custody.

I would request the Bureau of Prisons to stay any movement or transfer of the defendant until, for 90 days or until such time as he can complete his surgery here.

MR. DIAMOND: Thank you very much, sir.

I have nothing further.

THE COURT: Anything else?

MR. DIAMOND: No, sir. Thank you very much.

THE COURT: Thank you very much. Good luck to you, sir.

THE DEFENDANT: Thank you very much.

MR. HUMMEL: The government moves to dismiss all of [18] the additional counts that the defendant is named in within the superseding indictment.

THE COURT: Which ones, Mr. Hummel?

MR. HUMMEL: You know, Judge, I don't have a copy of the indictment.

MR. DIAMOND: I think I might have one here in my file. I only brought a small section of the file.

THE COURT: And which count was it that he was sentenced for. That is not in the PSI.

MR. HUMMEL: Count 2, your Honor.

THE COURT: Count 2.

MR. HUMMEL: Those additional counts are counts 9, 14 and 15 through 25. 9, 14, 15 through 25.

THE COURT: And they are now dismissed.

Thank you very much, folks,

(Court in recess)

[19] CERTIFICATE

I, JERALD J. REEVES, Shorthand Reporter and Notary Public, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Jerald J. Reeves September 2, 2006
JERALD J. REEVES, RPR

Case 1:95-cr-00481-AJ Document 654
Entered on FLSD Docket 09/25/2000

**United States District Court**
**Southern District of Florida**

UNITED STATES OF AMERICA

v.

**WILFREDO SCHERY**

**JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed on or After November 1, 1987)

Case Number: 0:95CR00481-009

A.U.S.A. – Hummel Nathan Diamond, Esq.

Defendant's Attorney

**THE DEFENDANT:**

☒ pleaded guilty to count(s) 2

* * *

| Title & Section | Nature Of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 U.S.C. § 841(a)(1) | Conspiracy to possess w/intent to distribute cocaine | 08/26/1997 | 2 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on _____ count(s)

☒ Count(s) remaining are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. [Social Security Number Omitted]

Defendant's Date of Birth: [Date Of Birth Omitted]

Defendant's USM No.: 40808-054

Defendant's Residence Address:

Miami FL 33132

Defendant's Mailing Address:

Miami FL 33132

09/13/2000
Date of Imposition of Judgment

/s/ Norman C. Roettger
Signature of Judicial Officer

NORMAN C. ROETTGER
U.S. DISTRICT COURT JUDGE
Name & Title of Judicial Officer

19 Sept 2000
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 188 month(s).

**Sentence imposed to run concurrently with defendant's present sentence in New York State system. These sentences are to be served in the Federal system.**

* * *

☒ The court makes the following recommendations to the Bureau of Prisons:

South Florida (Defendant to remain here for 90 days to complete knee surgery.)

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s)

**If deported period of Supervised release shall be non-reporting. If deported the defendant shall not re-enter the U.S. without prior written permission of the U.S. Attorney General.**

* * *

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | Assessments |
|---|---|
| **Totals:** | **$100.00** |

* * *

## STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * *

**Guideline Range Determined by the Court:**

Total Offense Level: 35

Criminal History Category: II

Imprisonment Range: 188 to 235 months

Supervised Release Range: 5 years

Fine Range: $20,000.00 to $4,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $____

* * *

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for following reason(s):

**The Court finds that a sentence at the low end of the guidelines range will provide sufficient punishment and deterrence.**

* * *

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Case 1:95-cr-00481-AJ Document 680
Entered on FLSD Docket 04/18/2001

UNITED STATES OF AMERICA,

v.

WILFREDO SCHERY,

Defendant.

_____/

**UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA**

Case No.:
95-181-CR-ROETTGER

**ORDER**

(Filed April 17, 2001)

**THIS CAUSE** is before the Court upon the government's motion to enter corrected judgment and commitment order filed under Rule 36 of the Federal Rules of Criminal Procedure. Upon consideration of the motion and the record in this cause, it is

**ORDERED AND ADJUDGED** that the government's motion for corrected judgment pursuant to Rule 36 is hereby **GRANTED**, to the following extent:

> The sentence on page 2 of the judgment and commitment order which reads "These sentences are to be served in the Federal system: is hereby amended to read "The court recommends that these sentences be served in the Federal system".

In all other respects the terms of the Judgment and Commitment Order for this cause shall remain the same.

**DONE AND ORDERED** this 16 day of April, 2001.

/s/ N.C. Roettger
NORMAN C. ROETTGER
UNITED STATES DISTRICT
COURT JUDGE

cc: counsel of record